IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 4, 2001

STATE OF TENNESSEE v. RAMON LAMONT TAYLOR

Direct Appeal from the Circuit Court for Obion County
No. 0-233 William B. Acree, Jr., Judge

No. W2001-00829-CCA-R3-CD - Filed March 15, 2002

The Appellant, Ramon Lamont Taylor, was convicted of one count of Class B felony possession of cocaine with the intent to sell and of two counts of felony possession of weapons. *See* Tenn. Code Ann. §§ 39-17-417(c)(1) and 39-17-1307(b)(1)(B). The cocaine and weapons were seized during the execution of a search warrant which was obtained based upon a canine sniff indicating the presence of drugs in a storage unit leased to Taylor. On appeal, Taylor contends that the affidavit lacks probable cause because it fails to establish that the police dog was, in fact, a drug dog adequately trained in the detection of drugs. After review, we agree and find that the search warrant was issued without probable cause. Accordingly, the convictions are reversed and the case is remanded to the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Reversed and Remanded.

DAVID G. HAYES, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and DAVID H. WELLES, J., joined.

David L. Hamblen, Union City, Tennessee, for the Appellant, Ramon Lamont Taylor.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Mark E. Davidson, Assistant Attorney General; Thomas A. Thomas, District Attorney General; and James Cannon, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

At approximately 11:40 p.m., on August 12, 1999, Officer Karl Jackson of the Union City Police Department received an anonymous phone call informing him that "a large amount of crack cocaine" was in room 28 of a storage rental facility owned by C & A Enterprises. The informant also stated that the storage facility "belonged to [the Appellant]." Based upon this tip, Officer Jackson

contacted the Union City K-9 Unit and requested use of the dog for a drug sweep of the storage facility. The drug dog, CeeCee, was escorted along several rooms and "alerted" positive to the presence of drugs upon reaching unit 28. The owner of the facility was also contacted and provided officers with a copy of the lease listing the Appellant as the current renter of unit 28.

The premises were secured while Officer Jackson returned to the station to prepare the search warrant. The affidavit portion of the warrant presented to the general sessions judge read as follows:

> The Affiant believes that [the Appellant] has possession of the above described property because . . . the affiant received information that storage room #28 of C & A Interprises [sic] was being rented by [the Appellant] and that room contained a large amount of crack cocaine. Affiant called for U.C.P.D. K-9 unit. The K-9 "CeeCee" was walked by rooms #26, #27, and room #28. The K-9 alerted to room #28 to contain an odor of cocaine, or marijuana, or heroin, or methamphetamine.

After issuance of the search warrant, Officer Jackson and several other law enforcement officers conducted a search of unit 28. A Cadillac Seville, which was registered to the Appellant, was parked inside the unit. Inside the vehicle, officers found 113.6 grams of crack cocaine located in a coat pocket. Two handguns, $1,770 in cash, and ammunition were also seized from the vehicle.

ANALYSIS

The Appellant argues that the trial court erred by denying his motion to suppress evidence seized as a result of the search warrant. First, he contends that the affidavit presented in support of the application for a search warrant was insufficient to establish probable cause because the warrant failed to make any reference to the dog's training or expertise in detecting drugs. Second, the Appellant asserts that the affidavit did not provide the magistrate with sufficient information to determine if the allegations of illegal activity were current and ongoing or stale and unreliable.

The trial court denied the Appellant's motion to suppress the evidence seized from the storage facility, finding in part:

> This search warrant states, in part, "Affiant called for UCPD," which we know is the Union City Police Department, K-9 Unit. The K-9 Unit [CeeCee] was walked by rooms, etc., and alerted. The K-9 Unit alerted for room 28 to contain an odor of cocaine, or marijuana, or heroine, or methamphetamine. This Court is of the opinion that reference in the affidavit to the UCPD K-9 Unit, referring to the dog by name, and also referring to what the dog is capable of smelling, four different substances is enough to give probable cause.

This court's review of the trial court's findings of fact and law in denying the Appellant's motion to suppress entails the following examination:

> [W]e will uphold the trial court's findings regarding the "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence," unless the evidence preponderates against these findings. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The application of the law to the facts found by the trial court, however, is a question of law which this court reviews *de novo*. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997); *Odom*, 928 S.W.2d at 23.

State v. England, 19 S.W.3d 762, 766 (Tenn. 2000).

In *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989), our supreme court set forth the standard by which probable cause will be measured to determine whether a search warrant is proper under Tenn. Const., art. I, § 7. In so doing, our court adopted the two-pronged "basis of knowledge" and "veracity" test of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964)(*overruled by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983)), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969). It is the magistrate's need for independent judgment in the issuance of a search warrant which compelled the basis for the two-pronged test adopted in *Aguilar* and *Spinelli*. Under the veracity prong, which is challenged in this case, "facts must be revealed which permit the magistrate to determine either the inherent credibility of the informant or the reliability of his information on the particular occasion." *State v. Moon*, 841 S.W.2d 336, 338 (Tenn. Crim. App. 1992). In this regard, we find our supreme court's recent holding in *State v. England*, 19 S.W.3d at 768, controlling on the question of the proof necessary to satisfy a drug dog's reliability and credibility in establishing probable cause:[1]

> We believe . . . that the finding of probable cause should turn on the reliability of the canine and that the trial court should ensure that the canine is reliable by an appropriate finding of fact. *See, e.g., United States v. Fernandez*, 772 F.2d 495, 497-98 & n. 2 (9th Cir. 1985)(court unable to determine whether probable cause was established since no evidence existed as to canine's reliability); *Horton v. Goose Creek Indep. Sch. District*, 690 F.2d 470, 482 (5 th Cir. 1982)(remanding to evaluate dog's reliability); *United States v. Colon*, 845 F. Supp. 923, 928 (D.P.R. 1994)(lack of evidence in the record concerning narcotics dog reliability precludes probable cause determination); *State v. Barker*, 252 Kan. 949, 850 P.2d 885, 893 (1993)(remanding to obtain testimony "from the handler of the dog as to the training, background, characteristics, capabilities, and behavior of the dog"); *see also United*

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[1]We would acknowledge that *England* involved a warrantless search, whereas, the case before us involves a search pursuant to a warrant; nonetheless, the probable cause standard remains the same, *i.e.:*

> [W]hether at that moment the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [accused] had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225 (1964).

States v. $80,760.00 In U.S. Currency, 781 F. Supp. 462, 478 (N.D. Tex. 1991)("[r]eliability problems arise when the dog receives poor training, has an inconsistent record, searches for narcotics in conditions without reliability controls or receives cues from its handler"); *United States v. $67,220.00 In U.S. Currency*, 957 F.2d 280, 285 (6th Cir. 1992)(evaluating dog alert evidence as "weak" because "the government did not obtain testimony from the dog's handler or anyone else familiar with the performance or reliability of the dog"). As the United States District Court for the Northern District of Texas has stated:

> Reliability problems arise when the dog receives poor training, has an inconsistent record, searches for narcotics in conditions without reliability controls or receives cues from its handler . . . .
>
> *$80,760.00 In U.S. Currency*, 781 F. Supp. at 478 (footnote omitted).

Accordingly, in our view, the trial court, in making the reliability determination may consider such factors as: the canine's training and the canine's "track record," with emphasis on the amount of false negatives and false positives the dog has furnished. The trial court should also consider the officer's training and experience with this particular canine. 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(f), 366-67 (2nd ed. 1987); *see also* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 432-33 (1997)(stating that the handler's training should include "consistent pairing with one dog, warnings against handler cues, and training under difficult environments").[2]

"[I]n passing on the validity of a warrant, the reviewing court may consider *only* the information brought to the magistrate's attention." *Aguilar*, 84 S. Ct. at 1511, n.1. In the present case, the proof before the magistrate of the drug dog's reliability and credibility in detecting drugs falls measurably short of the requisite proof outlined in *England*. Indeed, no proof was presented to the magistrate showing that the police dog was trained in drug detection or that the dog was, in fact, a drug dog. The affidavit also failed to establish the dog's "track record" for detecting narcotics. We hold that an affidavit supported only by a "canine alert," and absent any proof of the dog's reliability and credibility in drug detection, does not present a magistrate with sufficient information to permit the magistrate to make a fully independent determination of probable cause.

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[2] In its holding in *England*, the supreme court expressly rejected the frequently cited federal rule that a dog sniff indicating the presence of contraband constitutes *per se* probable cause for the issuance of a search warrant. *England*, 19 S.W.3d at 768. In this regard, we are constrained to note that the State in its brief erroneously relies upon federal decisions which have adopted the *per se* rule and upon other federal decisions which utilize "the totality of circumstances" test for probable cause adopted in *Illinois v. Gates*, 103 S. Ct. at 2317. The "totality of circumstances" test was expressly rejected by our supreme court in *Jacumin*.

CONCLUSION

After review, we find the search warrant was not issued upon probable cause and any evidence obtained as a result of the search pursuant to the warrant should have been suppressed. Accordingly, we reverse the convictions and remand this case to the Obion County Circuit Court.

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DAVID G. HAYES, JUDGE